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SUBJECT: UPON THIS ROCK: HONG KONG RULE OF LAW REMAINS SOLID (PART I)

REF: (A) HONG KONG 101 (B) 09 HONG KONG 1742 (C) 09
HONG KONG 483

Classified By: Acting Consul General Christopher Marut for reasons 1.4(b) and (d)

¶1. (C) Summary and comment: Hong Kong legal professionals judged Hong Kong's rule of law remains both independent and, more importantly, sufficiently well-designed that few opportunities exist for external tampering. They believed Beijing recognizes the singular role rule of law plays in Hong Kong, and would therefore hesitate to interfere. No one could recall a case involving either pressure on a judge to rule in a particular way or on legal professionals to avoid certain clients or cases. A scholar suggested the other threat to rule of law would be if political activists decided judicial remedies were no longer a viable means of checking the government, leading them to resort to extra-legal means of addressing their grievances. We judge such an eventuality as extremely unlikely at present, and unlikely ever to win public support. End summary and comment.

Introduction

¶2. (C) Perhaps the single strongest -- and most essential -- pillar of the "one country, two systems" framework is Hong Kong's independent judiciary. Rule of law remains akin to a secular religion in Hong Kong. The occasion of Andrew Li Kwok-nang opening his final Legal Year as Chief Justice (CJ) of the Hong Kong Court of Final Appeal (CFA) prompted us to review with some of the major players their assessment of the state of legal and judicial independence in Hong Kong. Justices, practitioners and professors all generally believe this institution remains strong and vital. Part I of this report presents our assessment that, at present and for the foreseeable future, Hong Kong's legal system is institutionally and culturally resistant to external pressure. Part II (septel) will deal with the state of Hong Kong's legal culture and its links to the larger common law community.

¶3. (C) We spoke with: CFA Permanent Justice Kemal Bokhary, Hong Kong University Law School Dean Johannes Chan Man-mun, Law Society (represents solicitors) President Wong Kwai-huen, and Bar Association (represents barristers) Chairman Russell Coleman SC. We also spoke with Democratic Party founder Martin Lee Chu-ming, who ranks second on the Bar Association's seniority list. All save Lee felt the institutions of rule of law in Hong Kong were strong, and even Lee could not point to a specific instance of a lawyer or judicial official bowing to external pressure.

Effective Law Amidst Defective Democracy

¶4. (C) Justice Bokhary asked rhetorically how rule of law could flourish absent democratic government, a question particularly important given that the actions and legislation of Hong Kong's largely non-elected government are nonetheless subject to judicial review under the Basic Law and the Hong Kong Bill of Rights Ordinance. Bokhary noted three requirements: (1) A qualified, independent legal profession, which should be supported by (2) a good academy (Bokhary here cited HKU Law School Dean Chan specifically), and enjoy (3) the respect of the public. Our contacts all regarded these conditions as having been met in Hong Kong.

¶5. (C) Hong Kong's bench and bar enjoy respect across the political spectrum, and the judiciary trumps both the executive and the legislature in polled assessments of public trust. Much of the credit goes to CJ Li himself, who took steps large (using his extensive contacts at the Bar to recruit top legal talent to the bench) and small (insisting judges and counsel continue to appear in court resplendent in full wig-and-gown regalia) to strengthen and preserve Hong Kong's common law tradition.

Tamper-Resistant Design

¶6. (C) The first potential vulnerability we suggested to our interlocutors was political manipulation of the judicial appointments process. The two points at which the succession process for CJ Li -- or any other high-level judicial nomination in future -- could conceivably encounter tampering are in the nomination process and the "endorsement" by the

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Legislative Council (LegCo). Our contacts assessed both the possibility and feasibility of skewing either process as slim. They took pains to note the apolitical nature of the process, drawing a respectful (if pointed) contrast with judicial nominations in the United States.

¶7. (C) In accordance with Article 88 of the Basic Law, "judges...shall be appointed by the Chief Executive (CE) on the recommendation of an independent commission composed of local judges, persons from the legal profession, and eminent persons from other sectors." Said commission is convened under the Judicial Officers' Recommendation Commission Ordinance, and is comprised of the CFA Chief Justice (ex officio Chairman), the Secretary of Justice (currently Wong Yan-lung, SC, also ex officio), two judges, a representative each from the Bar Association and Law Society, and three "lay members" "who are not, in the opinion of the Chief Executive, connected in any way with the practice of law." The Ordinance requires the CE to solicit nominations from the Bar Association and the Law Society for their respective seats, but does not obligate him to accept the recommendations (though in practice we expect he would).

¶8. (C) Operationally, assuming the professional representatives and the judges are reckoned as putting the institution first (a solid bet in Hong Kong at present), the only way for the CE to influence the nomination process would be through the three "lay members." Even then, three votes are enough to scuttle a nomination, but not enough to push a particular name forward.

¶9. (C) While we do not see scope for the CE appointing someone not recommended by the commission, whether the CE can legally reject the commission's nominee and request a second recommendation is unclear. As reported ref B, Civic Party Legal Functional Constituency legislator Margaret Ng Ngori-yeo believed the "shall be appointed" language in BL 88 meant the CE was obligated to appoint whomever the commission recommended, an obligation which to our eye is not so iron-clad from the wording. Whatever his power in theory, however, no one with whom we spoke expressed any expectation other than that the single name proposed by the commission

would be duly nominated by the CE.

¶10. (C) Article 90 of the Basic Law adds the additional step of "endorsement" by the Legislative Council of nominations for CFA justices and for the Chief Judge of the High Court. While this might also serve as a venue for politicking, a suggestion by Civic Party legislators Audrey Eu Yuet-mee and Ronny Tong Ka-wah that Li's successor face a U.S.-style confirmation hearing was quickly and firmly smacked down by the profession and their fellow Civic Margaret Ng (ref B). Ng told us LegCo should normally make an up-or-down vote, with the "down" coming only in the unusual circumstance of some flaw in the nomination process.

External Pressure

¶11. (C) Assuming as noted above that Beijing cannot easily intervene in the judicial nominations process via the Hong Kong government, the two means it might employ to interfere in Hong Kong's legal system would be interpretation of the Basic Law or by bringing pressure to bear on judges or legal professionals. Although the Basic Law of Hong Kong (and, for that matter, Macau) is "constitutional" to the extent that it is a standard by which the Court of Final Appeal conducts judicial review of government actions, it does not possess "original" authority. Special Administrative Regions (SARs) exist owing to a section of the PRC constitution authorizing the government to establish them, and then specific legislation passed by the National People's Congress (NPC) creating each SAR. The NPC Standing Committee (NPC/SC) has the final authority to interpret the Basic Law of a SAR. (Comment: This fact has been stressed in recent years by PRC leaders including NPC Chairman Wu Bangguo. The Basic Law could more accurately be seen as the charter of the SAR which, like the Letters Patent which established the Crown Colony of Hong Kong, can be changed by the sovereign state. End comment.)

¶12. (C) To date, there has been only one interpretation of the Basic Law made in reference to a court decision. The NPC/SC's June 1999 interpretation overturned a ruling by the CFA in "Ng Ka Ling and others v. Director of Immigration" that would have granted "right of abode" to possibly hundreds of thousands of children of Mainland parents who subsequently acquired Hong Kong residence. It bears noting that the interpretation came at the request of the Hong Kong SAR

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government (which feared an economically unsustainable influx of Mainland immigrants) despite signals that the central government preferred not to become involved. Putting aside the specifics of the "right of abode" issue, the interpretation was seen by many observers as a severe (some feared, a mortal) blow to the independence of the Hong Kong judiciary. The extent to which the interpretation represented a line drawn by the NPC and tacitly acknowledged by the Li court is difficult to determine: while the NPC/SC has not intervened in any subsequent court decisions, no one has suggested the court is any less willing to rule against the government in judicial review cases.

¶13. (C) Only Martin Lee suggested that there were judges who might be influenced by Beijing. He told us he thought there were a small number of judges traveling regularly to the Mainland who might be subjected either to pressure or attempts at influence. That said, even he admitted he had no specific cause for concern at the current time. None of our other contacts believed Beijing had attempted to pressure judges to make particular decisions.

¶14. (C) We put to our contacts the idea that Beijing might put pressure on lawyers by intimating they could lose profitable Mainland business should they take particular cases or clients. Neither the Law Society's Wong nor the Bar

Association's Coleman believed practitioners had come under such pressure. In part, this may be because Hong Kong legal professionals cannot at present practice law on the Mainland (although they can gain the right to practice by sitting the PRC Bar Exam) and thus have no real business to lose. This situation may change should the Closer Economic Partnership Arrangement be expanded to grant recognition on the Mainland to Hong Kong legal credentials, but neither Coleman nor Wong seemed concerned. Even then, Wong suggested, the potential for influence would be limited: the firms keenest to enter the China market were probably already the most pro-China, and therefore already avoided controversial clients.

Potential for Erosion

¶115. (C) The final potential threat to Hong Kong's rule of law system would be erosion, by which we mean a degradation in the quality or integrity of Hong Kong's bench and bar. As noted above, all the key players remain fiercely committed to maintaining the integrity of the profession and the judiciary, free from external political influence. The issue of Hong Kong's ability to produce the same caliber of legal professionals it currently enjoys will be discussed in Part II of the report; suffice it to say here our contacts did not express concerns. Part II will also discuss Hong Kong's substantial efforts to maintain its role as an active member of the international common law community.

¶116. (C) HKU Law School Dean Chan suggested a different kind of erosion: that the public, particularly the radical wing of the activist community, might lose faith in judicial remedies to address their complaints. Judicial review can stop the government from executing specific policies, but cannot change the (currently unrepresentative) structure of the SAR government. Chan fears that, if the courts are no longer seen as useful, activists might resort to other, potentially violent, means of redress. (Comment: Hong Kong radicals like the League of Social Democrats have "pushed the envelope" for years, and certain elements in the "post-1980s" movement seem inclined to push it further (see ref A). However, no one has suggested opposing Hong Kong's judicial system, which is currently the strongest institution protecting the rights enjoyed by citizens. While we do not rule out a radical fringe taking this step, we expect the resulting condemnation by the general public would be swift and sharp. End comment.)

MARUT